

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7440

Petition of Entergy Nuclear Vermont Yankee, LLC, and)
Entergy Nuclear Operations, Inc., for amendment of)
their Certificates of Public Good and other approvals)
required under 10 V.S.A. §§ 6501-6504 and 30 V.S.A.)
§§ 231(a), 248 & 254, for authority to continue after)
March 21, 2012, operation of the Vermont Yankee)
Nuclear Power Station, including the storage of spent-)
nuclear fuel)

Order entered: 4/20/2010

ORDER RE: MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

On March 24, 2010, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy VY") filed a motion requesting that the Vermont Public Service Board ("Board") issue a Protective Order governing the release of a "Report of Investigation, Entergy Nuclear Vermont Yankee," dated February 22, 2010 ("the Investigation Report"), that it contends may include information that is subject to the attorney-client and attorney-work-product privileges. The Investigation Report contains information and material related to an investigation of Entergy VY's provision of inaccurate information concerning the presence of underground pipes containing radionuclides. Entergy VY seeks a Protective Order directing that the voluntary disclosure of the Investigation Report would not constitute a waiver of those privileges with respect to other privileged information that is not directly related to the underground piping that carries radionuclides at the Vermont Yankee Nuclear Power Station ("Vermont Yankee").

The Conservation Law Foundation ("CLF") opposes Entergy VY's Motion;¹ the Vermont Department of Public Service ("Department") and IBEW Local 300 ("IBEW") both support granting the Motion.

In this Order, the Board grants Entergy VY's request for a Protective Order, based upon our interpretation of Entergy VY's request. Specifically, the Board understands that Entergy VY seeks to make public the entire Investigation Report and does not claim any portion to be confidential. In addition, we understand that Entergy VY has agreed to voluntarily waive its potential claims of privilege with respect to the Investigation Report, if the Board grants the Protective Order so that such a waiver would not constitute a waiver of those privilege claims with respect to other documents.

Subject to that understanding, the Board grants Entergy VY's Motion. We conclude that release of the unredacted Investigation Report is in the public interest. The Board, the parties, the Public Oversight Panel, and the public as a whole will be better able to understand the events that led to the provision of inaccurate information in this investigation and as part of the Comprehensive Reliability Assessment required by Act 189 (2007–2008 session). In the absence of such an Order, it is likely that the Investigation Report would be released with substantial redactions, reducing the flow of information and potentially leading to protracted litigation on whether redacted information may or may not be covered by claims of privilege. The limited Protective Order we issue today avoids such an outcome.

II. BACKGROUND

As described in previous Orders in this docket, in January, 2010, the Department notified the Board that it had recently learned that underground piping that carried radionuclides existed at Vermont Yankee, notwithstanding earlier statements by representatives of Entergy VY that no such pipe systems existed. The Board convened a status conference on January 27, 2010, to

1. CLF states that the New England Coalition and the Vermont Public Interest Research Group join in the opposition to Entergy VY's request.

determine what further steps should occur in this proceeding based upon this event.² Entergy VY also stated that it was conducting an investigation into the inaccurate information concerning underground piping that it had provided in conjunction with the Board's consideration of Entergy VY's petition for extension of its permission to operate Vermont Yankee for another twenty years.

Entergy VY retained Morgan Lewis & Bockius LLP ("Morgan Lewis"), to "investigate, among other matters, statements made in this docket in testimony, exhibits and discovery responses" about the underground pipes. Entergy VY states that this review — which is set forth in the Investigation Report — is complete and that it should be available to the parties in this docket. However, Entergy VY asserts that the Investigation Report includes information and material subject to the attorney-client and attorney-work-product privileges. Entergy VY states that it will waive such privilege claims, if the Board issues a Protective Order that provides that such a waiver would not "otherwise waive its attorney-client, attorney-work-product or other privileges that relate to Entergy VY's litigation of this docket."

III. POSITION OF THE PARTIES

CLF opposes Entergy VY's Motion. CLF contends that Entergy VY's request, which CLF characterizes as a proposal to "keep out of public view everything in its investigation report" that is not directly related to the issue of underground piping carrying radionuclides, is overbroad. CLF asserts that it does not know what information Entergy VY has claimed to be privileged and that would not be disclosed. CLF also contends that granting the Motion could allow the exclusion of much relevant evidence contained in the Investigation Report, which it asserts should be made available to the parties.

CLF also maintains that Entergy VY has provided no basis for protection of any information in the Investigation Report. CLF argues that Entergy VY has not made any showing that information in the Investigation Report is privileged and should not be available to the public. CLF contends that any claim of privilege has been waived because Entergy VY has

2. The Department's letter, Entergy VY's response, and the status conference outcome are discussed in detail in a Procedural Order dated January 29, 2010.

made public statements about the Investigation Report and provided it to the Vermont Attorney General. Finally, CLF states that Entergy VY's *Reply to Demand for Information (EA-10-34)* to the Nuclear Regulatory Commission ("NRC") demonstrates that the Investigation Report is not privileged. CLF cites to page 8 of the *Reply*, which states that Entergy VY retained Morgan Lewis to conduct an independent non-privileged review of certain issues.

The Department supports the issuance of a Protective Order. The Department states that it has been working with Entergy VY to get the Investigation Report released to the public without redactions. The Department asserts that the Protective Order would "allow everyone to view the complete unredacted Report." The Department also maintains that issuance of the Order would "clarify a somewhat uncertain point of law regarding limited waivers of privilege in front of the Public Service Board." The Department also contests CLF's assertion that any privilege claims by Entergy VY have already been waived by the provision of the report to the Vermont Attorney General. The Department contends that this release was subject to a confidentiality agreement, which has been held in at least one other context not to be an unlimited waiver of the attorney-client privilege.

IBEW argues that Entergy VY's request is reasonable. According to IBEW, granting the Motion would establish a reasonable balance between public release of the information and Entergy VY's concerns related to the potential assertion of privileges for other information.

Entergy VY submitted additional comments in response to CLF's assertion concerning the Morgan Lewis Investigation Report. According to Entergy VY, Morgan Lewis conducted two reviews. The first was non-privileged, which Entergy VY represents was the information provided to the NRC and referred to by CLF. The second was the Investigation Report that is the subject of Entergy VY's Motion.

IV. DISCUSSION

Before turning to the merits of Entergy VY's request, we note that there is some confusion as to exactly what Entergy VY plans to make public. In its Motion, Entergy VY states that the Investigation Report would be made available to the parties. It also requests protection from a waiver of the attorney-client and attorney-work-product privileges, except to the extent that it

voluntarily waives this privilege for information provided in the Investigation Report "directly related to the issue of underground piping that carries radionuclides." This characterization suggests the possibility that there may be other information in the Investigation Report that would not be publicly disclosed. CLF appears to interpret Entergy VY's request in this manner.

By contrast, the Department and IBEW both appear to assume that the grant of a Protective Order would result in a complete release of the Investigation Report without redactions. In particular, the Department states that it has been working with Entergy VY "to try and get the Report to the public with no redactions." The Department maintains that granting the Protective Order would allow everyone to view the complete unredacted Investigation Report.

Based upon these comments, we need to clarify at the outset our understanding of Entergy VY's request. First, it appears that, if we grant the Protective Order, Entergy VY intends to release the entire Investigation Report, with no redactions, to the parties and the public. We recognize that Entergy VY's Motion appears to contain some reservations on the scope of release. But we rely upon the Department's representations as to the effect of our grant of a Protective Order, which we understand are based upon discussions with Entergy VY. We further rely on the lack of any mention in Entergy VY's Motion of redactions to the Investigation Report that, if its Motion is granted, it would release publicly.

We also note that, to the extent that Entergy VY intended that some portion of the Investigation Report would continue to be subject to one or more privilege or that something less than the full report would be released, it has not made any showing to support such a position. We share CLF's concern that, while Entergy VY seems to limit the scope of its waiver so that it does not extend to areas that are not directly related to the underground piping, it has not identified information in the Investigation Report that would fall outside of its waiver or demonstrated that the information is privileged.

Second, we understand the Protective Order request to have a limited purpose: Entergy VY would waive its potential claims of privilege with respect to the Investigation Report. However, Entergy VY wants to ensure that by doing so, it does not affect its potential claims of privilege with respect to any other information provided in this docket.

With these understandings, we conclude that it is appropriate to grant a Protective Order that specifies that Entergy VY's voluntary waiver of potential privilege claims with respect to the Investigation Report does not constitute a waiver of such claims with respect to other information that is not contained in the Investigation Report. The granting of the Protective Order will allow the parties, the public, and the Public Oversight Panel access to the full Investigation Report immediately. Otherwise, it is possible (if not likely) that the Report would only be issued in a redacted format, which could lead to further litigation on the reasonableness of such redactions. Moreover, the issuance of the Protective Order will essentially maintain the status quo with respect to all other information provided in this docket, neither expanding nor contracting the scope of any privilege claims. We find this result reasonable.

V. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The voluntary disclosure of the full, unredacted Report of Investigation by Morgan Lewis & Bockius LLP, dated February 22, 2010, to the parties in Docket No. 7440 and to the public does not constitute a waiver by Entergy Nuclear Vermont Yankee, LLC, or Entergy Nuclear Operations, Inc., of the attorney-client privilege, the attorney-work-product privilege, or any other privilege available to each company with respect to information or material that is not contained in the Report.

Dated at Montpelier, Vermont, this 20th day of April, 2010.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
)	

OFFICE OF THE CLERK

FILED: April 20, 2010

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)